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IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

IN THE MATTER OF THE APPLICATION OF THE SAN FRANCISCO AND SAN JOAQUIN VALLEY RAILWAY COMPANY,

For Mandamus,

vs.

COLUMBUS J. CRAYCROFT, JOSEPH SPINNEY, FRANCIS M. CHITTENDEN, EDMUND L. AUSTIN, and WM. T. McVEY, CONSTITUTING THE BOARD OF TRUSTEES OF THE CITY OF FRESNO,

Respondents.

PETITION FOR REHEARING

E. F. PRESTON,

Attorney for Petitioner.

Filed this ..... *day of* ....., *1896.*

T. H. WARD, Clerk.

By ..... *Deputy Clerk.*

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Counsel for petitioner feels that it is possible that his points filed with this application, in compliance with the rule of this Court, were not sufficiently full to anticipate the consideration of propositions possibly considered decisive, but upon which he had hoped to have the advantage of oral argument before the Court, and that he was mistaken in resting upon what he thought was a prima facie case.

The great importance of the question presented, to the petitioner at least, and the fact that this matter is at present an *exparte* application, induces counsel to file this additional brief in the hope that by a presentation of the different authorities and adjucations, in addition to the points on file, your Honors may deem it fit that the order denying the application be vacated, and that an opportunity may be given for the fullest hearing.

First.

Mandamus is the Proper Remedy.

A steam railroad is a public use, and the power of the Board of Trustees, of the City of Fresno,

with respect to the granting or denying the application of petitioner, is a *quasi-judicial* function.

" When the law, in words or by implication, " commits to any officer the duty of looking " into facts, and acting upon them, not in a way " which specifically directs, but after a discretion " in its nature judicial, the function is termed " '*quasi-judicial.*' "

Bishop on Non-Contract Law, Secs. 785–786.

" Where a public body or officer has been " clothed by statute with power to do and act, " which concerns the public interest or the rights " of third persons, the execution of the power may " be insisted upon as a duty, though the phraseology of the statute be permissive merely and " not peremptory."

Mechem on Public Officers, Sec. 593.

" The performance of the duty may be enforced, but the exercise of the discretion will " not be coerced. In other words, the officer " may be required to act, but not to act in any " particular way."

Ib. Sec. 594.

"Where the function, which is to be per-
"formed by the officer against whom the man-
"damus is to issue, is of a judicial or *quasi-*
"*judicial* character, the mandamus will lie, only
"where he fails to perform the duty enjoined
"upon him; or, in other words, a mandamus will
"be granted to compel him to act, where he neg-
"lects or refuses to act."

Throop on Public Officers, Sec. 820.

The petition for this writ alleges at paragraph VI, that the Board of Trustees is empowered to pass upon this application, and at paragraph VII, petitioner alleges that the Board refuses to take any action thereon. Were this power given for private purposes mandamus would not lie, but in the case of a public use it is different.

"Where a power for public purposes is con-
"ferred, a duty arises to execute that power."
The Supreme Court of the United States says in the leading case: "This is settled law, both
"in England and America."

Supervisors *vs.* U. S., 4 Wall., 435.

And the attention of the Court is particularly directed to the proposition that the building of a steam railroad is a public use and that this

Board of Trustees is empowered to act for public purposes, viz: to control or direct a public use.

"While an officer will thus not be compelled "to reach any particular conclusion, he can not "refuse in violation of his duty to act at all, and "if he does mandamus will compel him to act, "to take whatever action is necessary as a pre- "liminary to the exercise of his discretion as to "hear the claim, or entertain the petition," etc.

Mechem on Public Officers, Sec. 946.

Where a clerk refuses to approve a bond for an attachment, it was held:

"If, however, the clerk refuses to consider the "sufficiency of a bond tendered for his ap- "proval, either for no reason or for an assigned "insufficient reason, mandamus will lie; not to "compel him to approve the bond; that is a "matter for his own judgment; it will lie, to "compel him to consider and pronounce on the "sufficiency of the bond."

Mobile Mut. Ins. Co. *vs.* Cleveland, 76 Ala., 321.

See also:

Case *vs.* Blood. 71 Ia., 632.

Eden *vs.* Templeton, 72 Ia., 687.

People *vs.* Judge, 27 Mich., 170.

Atty. Genl. *vs.* Common Council, 29 Mich., 108.

State *vs.* Commrs., 31 O. St., 451.

People *vs.* Swift, 59 Mich., 529.

Petitioner avers that this Board of Trustees was proceeding, not to consider the application of petitioner, but to offer a franchise for sale to the highest bidder. The allegation was anticipatory of the return, and was done to facilitate a hearing. The construction I claim should be given to the statute of 1893, (pg. 288) will be presented under its appropriate head hereafter, but this branch of my case is predicated upon the assumption that the law of 1893 does not apply to steam railroads. It will be conceded, I think, that the Board of Trustees derives its power to pass upon applications for franchises of this character from one of two sources:

Sec. 470, C. C. Cal., or
Sub. 13, Sec. 764, Stat. 1889, pg. 391,

amending Act of 1883, providing for the formation of municipal corporations pursuant to

Sec. 6, Art. XII, Con. Cal.

In either event the power is statutory, and is limited by the law which gives it. The grant of

power to consent to the use of streets gives no right to sell to the highest bidder. It is a power to be used in the interest of the public for the public good. The general rule is, such powers cannot be abridged by any act of the municipality.

The People's Railroad Co. *vs.* Memphis Railroad Co., 10 Wall., 51.

See also:

City of South Pasadena *vs.* Los Angeles T. R. Co., Vol. X, Cal. Dec., 667.

If the statute of 1893 furnishes no shield for the threatened action of the Board, then it has no legal right to take those steps, and its duty is to pass upon petitioner's application. The conclusion of the Board that it is governed by the Act of 1893, is not an answer. This Court has gone much further upon this proposition than is necessary in this case. Where a committing magistrate held that a prisoner having already been examined upon a charge of murder "by a court of concurrent powers" could not again be examined, and discharged the prisoner, this Court issued a mandamus to compel the judge to proceed with the examination.

People *vs.* Barnes, 66 Cal., 594.

And where a Court refused to hear a charge of contempt upon the ground that it was barred by Sec. 336, C. C. P., this Court issued its writ to compel it to proceed and hear the case.

Temple *vs.* Sup. Ct. Los Angeles Co., 70 Cal., 211.

These were Court proceedings it is true, but this Board of Trustees is acting in a quasi-judicial capacity, and how can it divest itself of its duty to exercise its power conferred upon it for public purposes to pass upon this question, by taking steps without its statutory authority, which may preclude the main question from ever coming before it, any more than a Court may divest itself of its jurisdiction, or refuse to perform a duty by reason of a mistaken conception of the law.

A steam railroad asks permission to use certain public streets. The Board advertises for bids, and John Doe, who has never made any application, is the highest bidder, and the Board grants him a franchise. Where in the law outside of this Statute of 1893 is there any authority given for such a procedure? Where does the application of this railroad receive any consideration whatever? This is fully covered by the averments in the petition, page 7. What becomes of the

rights flowing to the company by virtue of its franchise obtained by its organization under and its compliance with the general laws of the State, relating to railroad corporations ?

Again, what other remedy has this petitioner but mandamus ? How can it obtain that discretionary action if the Board refuses to consider at all ? It may be said that the application can be denied, but is it a presumption to be tolerated that the consideration will be other than one that is just and fair to the applicant and to the public with due regard to the rights of both ? Petitioner only desires to obtain such a consideration.

Upon the question of remedy we very respectfully submit, that unless the Statute of 1893 is valid and operative, that the Board of Trustees of the City of Fresno should be compelled to pass upon the application of petitioner.

Second.

Under Settled Rules of Statutory Interpretation, the Statute of 1893 does not Apply to Steam Railroad Corporations.

It may as well be admitted that the very general language of the act would, if read literally,

apply to all railroads, and that if it does, this writ was properly denied.

a. General words in a statute do not always extend to every case which literally falls within them.

The charter of the City of Elizabeth, gave full power to the city to grant the right to lay down railroad tracks in the streets, and to regulate the running of cars thereon.

This language was construed as not applicable to steam railroads.

Chamberlain *vs.* E. E. C. Co., 41 N. J. Eq. 43.

The question of the rights of property owners in relation to steam railroads as at present defined in this State, will be considered later.

General language in charter of the City of Memphis, was limited in a railroad case to apply to only one class of roads.

The Peoples R. Co. *vs.* Memphis R. Co., 10 Wall, pg. 38, at pg. 51–4, and in that case the word "railroad" was used by *street* railroads as a designation.

In Brine *vs.* Ins. Co., 96 U. S., 627, the statutes of the State of Illinois, relating to the sale of real estate, were held to form part of the obligation of the contract, but when the

same Court came to construe the same question, with reference to the sale of the real estate of a steam railroad, the public use involved and its necessities, caused the Court to hold that the statutes, though in general language, were inapplicable to such roads, and in the same case, in considering the Chattel Mortgage Act of Illinois, equally general in its terms, the same rule of construction was adopted, and its provisions were decided not to cover the personal property of the road.

Hammock *vs.* Farmers' Loan & Trust Co., 105 U. S., 92.

So in this State, Sub. 1 of Sec. 2955, C. C. Cal., permits mortgages upon locomotives, engines and other rolling stock of a railroad. Sec. 2957, prescribes certain requisites to make them valid. Sec. 2961, makes a location for personal property of a common carrier. Sec. 456, of the same code, gives a general power to railroad corporations to mortgage their corporate property and franchises, the same as Sec. 465, Sub. 5, gives the general power to construct their road over streets, roads, etc. The U. S. Cir. Ct. of Appeals held that the provisions of the Code relating to chattel mortgages had no application to steam railroads, following the last case cited.

Union Loan and Trust Co. *vs.* S. Cal. Motor Co., 64 Fed. Rep., 450.

The main thought of these Federal decisions is the necessity for the use by the public, and the general doctrine of the Courts is to construe laws so as to promote intercourse and commerce and afford greater facilities therefor. This is well expressed by this Court in

Montgomery *vs.* Railway Co., 104 Cal., 190.

If this Court should be satisfied by the rules of reasonable construction, that it was not the intention of the Legislature to include steam railroads within the purview of this Act of 1893, then it should not adhere too rigidly "to the "mere letter of the statute or to too technical "rules of construction."

Oates *vs.* First Nat. Bank, 100 U. S., 239.

As Mr. Dillon says: Under general laws conferring upon railway companies the right of way over highways, and under special charters or general acts giving to incorporated places the right to control public streets within their limits embarrassing and difficult questions have arisen depending for their solution upon the supposed intent of the Legislature *to be collected from the body of legislation on the subject.*

Dillon on Mun. Cor., 4th Ed., Sec. 709.

While this statute seems by a literal reading to be sufficiently broad to cover this case, is it the fact?

The language of Section 1 of this Statute of 1893, is:

"Every franchise or privilege to erect or lay "telegraph or telephone wires, to construct or "operate railroads, along or upon any public "street or highway, or to exercise any other "privileges whatever, hereafter proposed to be "granted by the Board of Supervisors, Common "Council, or other governing or legislative body "of any county, city and county, city, town or "district within this State, shall be granted upon "the conditions of this Act provided, and not "otherwise."

No Board of Supervisors of a county could ever propose to grant a franchise or privilege to a steam railroad to construct its road across any street, avenue or highway within a county, because the right to construct is already vested in a steam railroad corporation, by virtue of the general law of the State, and such corporations are not required to make any such application.

Sub. 5, Sec. 465, C. C., Cal.

This section was fully considered and construed in the case of

Southern Pac. R. R. Co. *vs.* Ferris, 93 Cal., 263.

where the Court say (at page 265):

"If this is a public road, then, according to "the other findings and evidence, the railroad "corporation had constructed its road as it had "a right to do under Section 465, Sub. 5, of the "Civil Code, and the defendants had no right "to tear up its track."

As any steam railroad corporation would have a right to build across or along any highway in a county without making any application for or obtaining any privilege or franchise from the Board of Supervisors, it is evident that the language used in the Act, general as it may be, does not apply to steam railroads, and carrying out the rules of statutory construction, this Court cannot apply one meaning to the Act as to the character of franchises affected within counties, (where, if steam railroads had been intended, they might have been included by appropriate words) and another meaning to the character of franchises affected within the limits of cities and counties, cities, towns or districts.

It must be assumed that the Legislature knew that steam railroads were to be built and operated

both in counties, and in municipal corporations, and that as the language used did not include them, in one, then. why in the other?

"The particular inquiry is not what is the "abstract force of the words or what they may "comprehend, but in what sense they were in- "tended to be used as they are found in the act. "The sense in which they were intended to be "used, furnishes the rule of interpretation, and "this is to be collected from the context; and a "narrower or more extended meaning is to be "given according to the intention thus indicated."

Sutherland on Stat. Con., pp. 325–326.

The use by the Legislature of these general words must be restricted to that class of franchises or privileges which may be granted both by supervisors of counties.

Sub. 4, Sec. 25, County Government Act, Stat. 1893, p. 351, and by the governing bodies of incorporated towns, whether operating by special charter or under the general provisions of the municipal government act.

Stat. of 1883, p. 93, with the various acts amendatory thereof.

We think, therefore, that reading the Act in the light of the law, that it can have no application and cannot be extended to affect rights of

corporations which were not subject to, nor controlled by the Boards of Supervisors of counties, and therefore not within the perview of the statute of 1893. That Act in no wise purports to repeal any Act, nor to enlarge or grant additional powers to the governing bodies of counties or incorporated cities, but is expressly designed to operate as a limitation upon existing powers.

b. Where general language construed in a broad sense would lead to absurdity, it may be restrained.

Sutherland on Stat. Con., Sec. 246.

Would not the application of this statute to steam, or, strictly speaking, to commercial railroads, lead to an absurdity?

It is not to be supposed that the Legislature intended to prohibit, or render impracticable, the building of any more steam railroads in this State. A steam road seeking connection with a city, must operate its line as an entirety, the part without as well as the part within the city. All constitutes but one general system, and such is the spirit of the law.

Section 291, C. C., requires the articles of incorporation to state the termini, the estimated length of its road, and Sec. 293 provides that $1,000.00 for each mile of contemplated work shall have been subscribed, and Sub. 4, of Sec.

291, that ten per cent. of the capital stock subscribed shall be paid into the treasurer.

Compliance with the requisites, entitles the company to its charter and to exercise the rights given it by law. All this is in accord with the policy of civilized peoples to promote internal improvements and advance the public welfare. It undoubtedly acquired a *right* to construct a road beween its termini, and it has been held in other States that as it was necessary, in order to execute the powers to cross highways and even to use streets, such users were authorized by implication.

The Chief Justice of Illinois, in speaking for the Court of that State, uses this language:

" By its charter this company was authorized
" to bring its road to Chicago and to acquire
" property within the city. By this it was
" intended to allow the road to run into the city
" It was not the intention that it should be com-
" pelled to stop so soon as it touched the city
" limits and thus render the road comparatively
" useless both to the public and the company.
" The language of the charter requires no such
" limited construction, and the objects of the law
" would be evidently frustrated by so illiberal
" an interpretation."

Moses *vs.* Pittsburg, F. W. & C. R. Co.,
21 Ill., p 522.

The policy of the State in giving to the steam railroad a right to the use of the highways of the State, and free right of way across State lands, and the right which follows as a necessary implication from the other powers to enter cities, subject to the general control as to the reasonableness of the use by the governing council, is not peculiar to California, but is the re-enactment in almost identical phraseology of similar statutes that may be found upon the books of every State in the Union. The Supreme Court of Iowa uses the following language upon the subject:

"The propriety of conferring such a right in "relation to these roads and all similar improve- "ments, will appear obvious, we suppose, from "the fact that when lines of railway are located "for the most part in the country, their inter- "section of highways, or their running upon or "over the streets of a city, are merely an inci- "dent of the general design, and that the whole "enterprise would be greatly embarassed, if not "indeed often defeated, unless some such power "to run upon streets was vested somewhere."

Milburn et al. *vs.* The City of Cedar Rapids et al., 12 Iowa, at page 258.

And in that case such a right of way act was construed to give the power to run upon the

streets of cities, and the words "over and upon" are considered in connection with the use of the words by New York and other State statutes of "across and upon," and they are held synonymous, showing that the general law of this State was probably taken bodily from those of the older States.

Clinton *vs.* Cedar R. & M. R. R. R. Co., 24 Ia, 455–480.

Springfield *vs.* Conn. R. R. R. Co., 4 Cush., 63.

Commonwealth *vs.* E. & N. E. R. R. Co., 27 Pa., st. 354 and 355.

The method of using the power in this regard in California is found in the law of corporations, and to apply the provisions of the Stat. of 1893 as a qualification is simply to emasculate the general law of railroad corporations.

But what this Court terms the universal public sovereignty, found in our Constitution,

City of South Pasadena *vs.* Los Angeles Terminal Railway Co., No. 19,414, filed Oct. 2, 1895,

would seem to accentuate the point I seek to make. Railroads operating in more than one

county are assessed upon their whole property as a unit by the State Board of Equalization,

Con. Cal., Art. XIII, Sec. 10,

and the franchise for the entire length of the road is assessed as an entirety by the same board,

Ib.

And the other provisions of the organic law of this State, commencing with Sec. 17 of Art. XII, down to and including Sec. 24 of the same article, would show that it was contemplated that railroads should be built and operated within this State, and that each system for govermental purposes should be treated as an entirety.

In this view it is not absurd to say that when such a road as a part of its system locates its line "along or upon" a road in a county, or a street in a city, it can proceed no further with its construction unless it happens to succeed in placing the highest tender for the privilege with the governing board or council. If it fails by reason of not being the highest bidder, how can it get across any road, or series of roads, or streets? The Court will take judicial notice that a railroad passing through the most populous and productive part of the State of California for 350 miles, must of necessity be

constructed "upon and along" many highways, if it is to be built at all.

None other than the promoters of the main line could make a bona fide bid. The system between its termini being an entirety, both by constitution and statute, how can it be put up for sale upon competition in small parcels? Imagine being required to be the successful bidder for each separate privilege, no matter how small or how necessary, particularly when there can be no bidder, except a corporation duly qualified under the general law to exercise the franchise of a steam road. (See post.)

I do not wish to be understood to claim that the Legislature has not the power to produce this result, but I do claim that such was not the intention and that the statute should not receive such an interpretation. It would be to say, in fact, that the Legislature had taken away from cities the right to grant the use of its streets for commercial roads, no matter how necessary and useful they might be to the public, and this too, by implication, for the statutes I cite, show a design to encourage and promote, rather than to prohibit.

c. This Act should not be construed to apply to steam railroads because no grant can be made which would give the right to use streets or highways until compensation for damages is made to abutting property owners;

and if this petitioner was a successful bidder, and was granted the privileges asked, it might be enjoined from its use until compensation was made to abutters. The grant to a street railroad gives the absolute right.

In the language of the Superior Court of Michigan, the representative of the public cannot give away what does not belong to the public. The same case holds that this rule does not apply to a street railway. That travel upon a steam road between different points had no analogy to a street railroad.

I. R. R. C. *vs.* Heisel, 38 Mich., 62.
same case, 47 Mich., 393.

In Ohio the courts hold that a highway cannot constitutionally be appropriated for a steam road without compensation.

Railroad Co. *vs.* Williams, 38 O. St., 168.

So to the same effect is the ruling in New York.

Arnold *vs.* Hudson R. R. R. Co., 55 N. Y., 661.

And in the great elevated road case it was held that an injunction would lie to prevent the use.

Story *vs.* N. Y. E. R. R. Co., 90 N. Y., 122.

This court has decided that the use of a highway by a steam road is not an additional easement,

overruling prior cases with contrary doctrine, but at the same time holding the general principle that the use may be enjoined if threatened, and compensation recovered by damages if use is in enjoyment.

Montgomery *vs.* Railway Co., 104 Cal., 186.

There is a broad distinction between this doctrine and that of street railroads.

Mr. Elliott, in his work on Streets and Roads, after criticizing the term "street railway," admits that no better term can be used, though the word "street" is too restrictive as it may be operated upon suburban roads, but the distinctive feature is that it is operated for passengers and not for the transportation of freight.

Elliott Roads and Streets, p. 557,

and that the abutter is not entitled to any compensation.

Ib. p. 558.

See also:

Dillon on Mun. Cor., 4th Ed., Sec. 722.

Finch *vs.* Riverside, etc., Ry. Co., 87 Cal., 597.

1 Wood on Railroads, p. 747.

In other words the municipality may vest the grantee of a street railroad franchise with the full enjoyment of the privilige or franchise.

By examining Sec. 497, C. C., as amended in 1891, it will be observed that it is drawn with reference to the legal principles above stated; absolute authority to grant is given, recognizing the existence of the right. With steam roads the State itself grants *in presenti* (S. 465, C. C.) subject to the limitation before cited. The language of Sec. 497 is very general, only being limited by the purview of Title IV. The words "railroad" and "street railroad" are used indifferently throughout the title.

Sec. 497, "railroad tracks."
499, "two railroad corporations," (original section).
499, "two lines of street railway," (as amended in 1891).
500, "any proposed railroad track."
502, "work to construct the railroad."
503, "street railroad."
504, "street railroad."

And this same Legislature, on the 27th day of February, 1893, Stat. 1893, p. 44, passed another Act almost identical so far as the use of the word "railroad" is concerned with the one under consideration, and yet it would never be claimed that it applied to steam railroads. The title is:

"An Act requiring city, city and county, or "town authorities to exact and require from

" persons or corporations seeking permission and " authority to lay railroad tracks through streets " or public highways of any incorporated city, " city and county, or town, a satisfactory promise " and undertaking to permit and allow mail " carriers in the employ of the United States " Government at all times, while engaged in the " actual discharge of duty, to ride on the cars of " such railroad without paying fare; and to make " such promise and undertaking a condition " precedent to the granting of such permission " and authority by such governing board."

The provisions are sweeping:

"Sec. 1. In all cases hereafter, where applica- " tion is made to the city, city and county, or " town authorities, or to the Trustees, Council, " or other body to whom is intrusted the govern- " ment of the city, city and county, or town, for " permission and authority to lay railroad tracks " through streets or public highways of any " incorporated city, city and county, or town, " such authorities, before granting such per- " mission and authority, in addition to the terms " and restrictions which they are now, by law, " authorized to impose, must exact, and require, " from the persons or corporations," etc., but at the end is a proviso that all such permissions and franchises shall be governed by the laws of

this State, applicable to street railroads in general.

Some of the phraseology of this act is identical with that of the Statute at page 288 which we are considering, and it is quite possible both bills were drafted by the same bungling hand, for while the word "railroad" is used in the same manner as in the preceding act, there is also a statement in the nature of a proviso that if the franchise proposed to be granted is for a street railroad, the route must be stated. There is no reason which is apparent to the ordinary mind why the route of any railroad, if it was intended to apply the act to steam roads, should not be stated in the advertisement, and I have collected these various instances to show that the Legislature frequently uses the word "railroad" as applicable to street railroads, and that it would not be a safe rule for this Court to permit itself to be bound by the use of such language when investigation shows that the Legislature itself considers the word "railroad" is a fit and apt term to apply when only street railroads are under consideration.

d. Important principles of law, embodied in public statutes, are not to be abrogated, and the statutes repealed by implication, unless such intent is made clearly to appear.

In re Garcelon, 104 Cal., p. 584.

As are already mentioned, there are no words of repeal in this statute, and if it operates as such it does so by implication, a result this Court will avoid if possible.

Banks *vs.* Yolo Co., 104 Cal., 258.
Thorpe *vs.* Adams, L. R., 6 C. P. 135 affirmed.
Ex parte Crow Dog, 109 U. S., 556.

The Legislature is presumed to know existing statutes, and the state of the law relating to the subjects with which it deals. Hence, that they would expressly abrogate any prior statutes which are intended to be repealed by the legislation.

To hold that this statute operates as a repeal *pro tanto* of Sub. 5, of Sec. 467, and of Sec. 470 of the Civil Code, is to say that the Legislature intended to place commercial steam roads upon the same footing with street railroads, and to give the right to any successful bidder to operate a steam road without any regard to the question of whether he or they had acquired the right from the state by observance of the requisites necessary to obtain a charter for a steam road.

The collection of tolls for freights and fares upon a steam railroad is the exercise of a franchise which cannot be enjoyed except by legislative grant. Hence, no bidder could apply for a

franchise to operate a steam railroad except a steam railroad corporation, so that it is impossible that the Legislature should have intended to include this class of franchises among those for which there were to be *bidders.*

Inhabitants of Springfield *vs.* Conn. River R. R. Co., 4 Cush., 91.

The power to operate a steam road and to charge and collect tolls in the character of charges for freights and fares is a franchise, and can only be exercised by qualified corporations.

Beach on Railways, 823.

" The franchises of a railroad corporation are " rights or privileges which are essential to the " operation of the corporation and without which " its roads and works would be of little value ; " such as the franchise to run cars, to take tolls; " to appropriate earth and gravel for the bed of " its road, etc."

Morgan *vs.* Louisana, 93 U. S., 223.

This has no application to street railroads, because by a provision of Section 511 of the Civil Code, natural persons or associations may operate street railroads. Where then as in this case, this privilege is asked, it is not to operate the privilege as a distinct franchise, but as a

part of this system for which the company is chartered. It follows, therefore, that there could be no bidders under the operation of the Act of 1893, for a franchise applied for by one steam railroad corporation, except steam railroad corporations which have acquired their rights by compliance with the laws of the State of California necessary to be observed in order to vest such bidders with the franchise itself.

"The general terms of a later statute will "often be restricted where, by prior laws, sub-"jects naturally falling within such general "terms have been classified and made subject to "distinct and dissimilar regulations."

Sutherland on Stat. Con., Sec. 284, p 370.
People *vs.* Molyneux, 40 N. Y., 113.

One more thought upon this branch of the case. The franchise or privilege to be put up for bid must be one that is complete in itself. That is to say, it must be a franchise which of itself constitutes the whole system, and not a fragment of the franchise of a corporation obtained under the laws of the State for the purpose of inland commerce and intercourse, which by the Constitution of the State is specified to be an entirety.

THIRD.

The Statute of 1893, page 288, entitled: "An Act to provide for the sale of railroad and other franchises in municipalities, and relative to the granting of franchises," is unconstitutional.

The Constitution of the State of California provides: "Every Act shall embrace but one subject, which subject shall be embraced in its title."

Con. Cal., Article IV, Section 24.

By the terms of this Act it applies to counties, city and counties, cities, towns or districts. The subject of the government of municipal corporations is provided for by Section 6, Article XII, of the Constitution, and so far as any legislative action is concerned touching the government of municipal corporations, that government would constitute the subject matter of an Act. While it may be held that different objects, all germane to a municipal corporation, might be included, such an Act could only be sustained upon the construction that all matters pertaining to the government of municipalities formed one subject matter. Thus telegraphs, telephones, street railroads and other matter for the benefit of the inhabitants of cities, municipal in character,

may be grouped together, by treating them all as coming under the subject of municipal government.

Section 4, Article XII, provides for a system of county government entirely distinct from the system of government provided for municipal corporations, and any law passed in pursuance of Section 4 must relate to the subject matter of that section, that is, the government of counties. The constitutionality of the County Government Act of 1883 was attacked, and in sustaining this Act the Court says that the title: "An Act to establish a uniform system of County and Township Governments" embraces but one subject.

Longan *vs.* County of Solano, 65 Cal., 124.

The intent of the constitutional provision is to prevent the union in one act of incongruous matters and of business having no connection nor relation.

Sutherland on Stat. Con., page 90.

The government of a municipal corporation is a subject matter completely and entirely distinct under the organic law of the State from the subject matter of the government of counties. The Act creating a municipal corporation is an

entity so far as it may combine all of the necessary legislative, taxing, judicial and police powers. This comprises but one subject. The separate provisions are but parts of a whole and are essential to make a whole—a municipality.

The Supreme Court of New York says:

"We think it clear that an Act creating a "municipality and giving to it the necessary "taxing, judicial and police powers, embraces "but one subject. * * * * The whole "thing, the creation of the municipality, is the "subject of the act."

Harris *vs.* People, 59 N. Y., 599 at page 601.

Montclair *vs.* Ramsdell, 107 U. S., 147.

Grover *vs.* Trustees, etc., 45 N. J. L., 399.

Where the legislation is less comprehensive the subject may admit of joining only the topics in one subdivision. Or, if the legislation is still more in detail, even two topics in one subdivision would render the Act multifarious.

Sutherland Stat. Con., page 93.

As stated by the author last cited, at the beginning of Section 85, as his head note: "The provisions of an Act must be germane to one subject." It may be said, and it is the only answer which can be made, that there is but one

subject, namely: the sale of railroad and other franchises and relative to granting of franchises but when it is considered that these provisions are intended to relate both to municipal corporations organized under one section of the constitution, and to county governments organized under another section of the constitution, the multifariousness of the Act becomes at once apparent.

The rights of the governing bodies of municipalities concerning this very matter of the sale of franchises, are defined in the statute classifying and providing for the formation of municipal corporations, "An Act to provide for the or- "ganization, incorporation and government of "municipal corporations," Stat. 1883, page 93, with the various acts amendatory thereof, and so far as the same relates to the City of Fresno and railroad franchises, the powers of the Board of Trustees in cities of the fifth class are regulated by the 13th Sub. of Sec. 764, as amended by Stat. of 1889, page 391; while the powers of county officers concerning franchises may be found in the Act to establish a uniform system of county and township governments, Sub. 4 of Sec. 25, Stat. of 1893, page 351. This Act of 1893 purports to operate directly as a limitation upon the powers of the governing bodies of both municipalities and counties.

That the Act is void as comprising two subjects, becomes quite clear in the light of the adjudications.

One general law may provide how all municipal corporations may be organized, how all private corporations may be formed, but one Act to create two corporations, is void for duplicity.

Ex parte Conner, 51 Ga., 571.

And a much closer application of the doctrine than we seek to have applied was made by no less eminent a jurist than Judge Cooley in a case where a law provided for the expenditure of certain highway taxes on two distinct state roads, and for the construction of a third state road and for the expenditure of certain other taxes on that; it was held to embrace more than one subject. The three roads were held to be "three distinct objects of legislation." In delivering the opinion Judge Cooley said that it was the evils of this species of omnibus legislation which the constitution designed to prohibit.

People *vs.* Denahy, 20 Mich., 349.

And this case is important, as it was approved by this Court.

People *vs.* Parks 58 Cal., 640.

It is evident from the care which was taken to separate and distinguish the government of counties from the government of municipal corporations, that it was never intended that any

law should attempt to affect the government of counties and the government of municipal corporations in one breath, and the two subjects, that is county government and the government of municipal corporations, being entirely distinct, there are two subjects within the purview of this Statute of 1893.

There can be no segregation of this Act. It must stand or fall as a whole. There is nothing to indicate that the Legislature would have applied this restrictive legislation to one rather than to the other, to cities rather than to counties. The signification of "districts" as used, I have not attempted to follow, as it, if meaning less, cuts no figure.

"If the act embraces two distinct subjects, and "the Constitution says it shall embrace but one, "the whole act must be treated as void, from the "manifest impossibility of the Court choosing "between the two, and holding the act valid as "to one subject and void as to the other."

Cooley on Con. Lim., 6th Ed. 177.

In conclusion counsel desires to say that it has been his effort to present to this court the law, and nothing but the law. The application of a remedy and the construction of a statute are before you and I have attempted and think I have established that my position is directly

within the doctrine of cases decided by the highest tribunals in our country and announced by the leading text writers upon the subjects. Deprived of the advantage of oral argument, I respectfully request the most considerate attention of the court and ask that the order of January 11th, 1896, denying the petition for an alternative writ of mandate be vacated and that the writ be ordered issued.

E. F. PRESTON,

Counsel for Petitioner,

The S. F. & S. J. V. Ry. Co.

January 15, 1896.